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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. [redacted] 43

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation,

Appellants,

vs.

Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California,

Appellees.

On appeal from the United States District Court for the Northern District of California, Northern Division

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APPELLANTS' JURISDICTIONAL STATEMENT

Isaac E. Ferguson
13016 Victory Boulevard
North Hollywood, California

Attorney for appellants.

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Opinion of District Court

The three-judge District Court, on July 12, 1961, filed a "Memorandum and Order" finding against appellants on the merits of the case and directing the appellees to prepare findings of fact and conclusions of law, also a form of

judgment to be entered in accordance with the court's memorandum and order. Findings and conclusions of law were filed September 21, 1961. Said memorandum and order, findings of fact and conclusions of law are set forth in Appendix I hereof.

Jurisdiction of the appeal

Nature of the proceeding and the statute pursuant to which it is brought: Appellants, "handlers" of avocados grown in Florida, complain of restriction against the marketing of the Florida fruit in the State of California, by application thereto of the provision of Sec. 792 of the Agricultural Code of California barring sale in that state of avocados with less than 8% oil content, and seek declaratory judgment and injunction to end further enforcement of said statute against them by the state officers of California.

This case was here before (1959 Term, No. 49) on appeal from the judgment of the District Court dismissing the action, on defendants' motion, for want of jurisdiction (169 F. S. 774). This court reversed the judgment of the District Court and held: (1) that a three-judge District Court was properly convened to hear the case, pursuant to 28 U. S. C. Sec. 2281; (2) that the judgment of the District Court was appealable directly to this court, pursuant to 28 U. S. C. Sec. 1253; (3) that the complaint and the record then before the court presented an existing dispute between the parties as to present legal rights amounting

to a justiciable controversy which appellants were entitled to have determined on the merits; (4) that substantial grounds of unconstitutionality were asserted by appellants against application to their avocados of the California 8% oil content requirement for sale of the fruit in that state, namely, violation of the commerce clause of the United States Constitution (Art. I, Sec. 8, cl. 3) and of the equal protection clause of the Fourteenth Amendment, invoked in the District Court under 28 U. S. C. 1331; (5) that there was jurisdiction of the action in the District Court also under 28 U. S. C. 1337, and jurisdiction of this court on the appeal, on appellants' claim that enforcement of California's 8% oil content requirement to bar sale in that state of the Florida avocados constitutes an impermissible conflict with the marketing of the Florida fruit under the maturity and quality regulations issued by the Secretary of Agriculture of the United States pursuant to authority vested in him by an Act of Congress regulating interstate commerce, the Agricultural Marketing Agreement Act of 1937.

Date of judgment and notice of appeal: The judgment of the District Court now sought to be reviewed was entered September 22, 1961, and notice of appeal was filed by appellants in the office of the clerk of the United States District Court for the Northern District of California, Northern Division, on October 10, 1961.

Statutory provision for appeal: The appeal is taken pursuant to 28 U. S. C. Sec. 1253.

Cases sustaining jurisdiction: In view of

the decision of this court on the previous appeal in this case (362 U. S. 73, 80 S. Ct. 568), further citation of cases sustaining jurisdiction of the appeal is deemed unnecessary.

Statutes involved: Sec. 792 of Agricultural Code of California; also enforcement provisions, Secs. 784, 785, 785.6, 790 and 831, Deering's Agricultural Code Annotated of the State of California, 1950 edition, and 1959 cumulative supplement, set forth in Appendix II, infra; Federal Agricultural Marketing Agreement Act of 1937, 7 U. S. C. A. Secs. 601, 602, 608, 608b, 608c, set forth in Appendix III, infra.

Questions presented by the appeal

(1)

Does not the commerce clause of the United States Constitution (Art. I, Sec. 8, cl. 3), of its own force, preclude inhibition of sale in California of avocados grown in Florida and shipped in interstate commerce, on the ground that said avocados have less than the 8% of oil content demanded by Sec. 792 of the Agricultural Code of California, even though said avocados of their nature and conditions of growth mature with less than 8% oil content and are not for that reason deleterious, unpalatable, or of inferior quality?

(2)

Does not the application of Sec. 792 of the

Agricultural Code of California to avocados produced in Florida and shipped for sale in California result, in practical effect, in arbitrary discrimination against the Florida fruit to the commercial advantage of the growers and handlers of the avocados produced in California, and thus deny to the shippers of the Florida fruit the equal protection of the law commanded by the Fourteenth Amendment, since the avocados produced in Florida are predominantly of varieties that of their nature and conditions of growth attain maturity and maximal quality with less than 8% oil content, but are not for that reason inimical to health or unpalatable, while the avocados produced in California are predominantly of varieties that of their nature and conditions of growth attain maturity with oil content far in excess of 8%?

(3)

In face of the supremacy clause of the United States Constitution (Art. VI, Sec. 2), may officers of the State of California debar from sale in that state avocados grown in Florida and shipped in interstate commerce in compliance with the maturity and quality regulations for the marketing of said avocados established by the Secretary of Agriculture of the United States pursuant to authority vested in him by Congress in the Agricultural Marketing Agreement Act of 1937, by disregarding the federal certification of such avocados as of requisite maturity and quality for interstate marketing and, instead, subjecting such avocados to another and different determination of maturity and quality prescribed by state law?

Facts of the case material to the questions presented

Since June 11, 1954 the marketing of avocados grown in South Florida has been regulated by the Secretary of Agriculture of the United States, pursuant to authority vested in him by the Agricultural Marketing Agreement Act of 1937. (Marketing Order No. 69, 19 F. R. 3439, and the numerous orders and regulations thereunder published in the Federal Register from 1954 onward.)

The Marketing Agreement Act grants to the Secretary of Agriculture various regulatory powers aimed to establish and maintain orderly marketing conditions for agricultural commodities in interstate commerce. (Appendix III, infra.) Of the specific regulatory powers given to the Secretary, the marketing agreement and order with respect to Florida avocados set in action exercise of the power "to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title *** in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest." (Appendix III, Ap. p. 50.)

The orders issued by the Secretary govern the "handlers" of the specified agricultural commodity, in "such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or

affects, interstate or foreign commerce in such commodity or product thereof. " (Appendix III, Ap. p. 53 .)

As reason for adoption of the marketing agreement with the growers and handlers of the Florida avocados, the Secretary made findings that 80% to 90% of Florida avocados are sold in markets outside the state, and that all handling of avocados grown in the designated production area is in the current of interstate and foreign commerce, or directly affects such commerce. (19 F. R. 2418 and 2784; also Order No. 69, Sec. 969. 0 (2) and (5), 19 F. R. 3439.)

Appellants have been registered handlers of Florida avocados ever since the promulgation of the Secretary's 1954 marketing order; in recent years fully 99% of the avocados handled by them have been marketed outside the state of Florida, all in compliance with the maturity and quality standards established by the Secretary of Agriculture in the exercise of the authority granted to him by the Marketing Agreement Act.

Restriction of access to California market

Although all avocados shipped out of Florida are accompanied by a certificate of inspection issued by the Joint Inspection Service of the United States Department of Agriculture and the Florida Department of Agriculture, showing that the avocados meet the maturity and quality standards in effect under the federal marketing order (PX 3), such certificate is entirely ignored when the fruit enters the

California market. Instead, sale of the avocados in California is barred, by seizure for peremptory condemnation and possible other severe civil and criminal penalties, unless the avocados pass the 8% minimum oil content test imposed by Sec. 792 of the Agricultural Code of California. (Appendix II, Ap. p. 48.) The result has been to frustrate the efforts of appellants to avail themselves fully and freely of the highly favorable market for their avocados in the state of California.

California and Florida are the only states in which avocados are produced commercially. Consumption of avocados is at its highest in California, approximately equal to the consumption of avocados in all of the other states together. Although the California crop of avocados is substantially greater than that of Florida, there are four to five months in the year when the supply of Florida avocados exceeds that of California, the autumn and early winter period. So far as distance is concerned, shipment by refrigerated trucks, speeded in recent years by progressive improvement in motors and highways, has made sale of Florida avocados in California commercially feasible and attractive. The impediment is California's 8% oil content requirement for sale of the fruit in that state.

Effect of California's 8% oil content requirement on marketing of Florida avocados

Avocados are of numerous varieties,

differing radically in external and internal characteristics. In the crop seasons from 1954 onward, 45 named varieties of avocados have been produced commercially in Florida. (PX 6 and 9.) The time of year when the different varieties attain maturity and are ready to be marketed ranges from mid-June to the end of the year. Also, oil content of the avocados, at the time of maturity, varies greatly not only as between the different varieties of the fruit but also between the avocados of the same variety.

Oil content does not enter into the determination of maturity of the Florida avocados. A decade of intensive research on the subject of determination of maturity of Florida avocados, conducted by Dr. Roy W. Harkness, at the Homestead Sub-Tropical Experiment Station of the University of Florida, and by Dr. Paul L. Harding of the United States Department of Agriculture and his staff of assistants, at the Horticultural Field Station of the Department at Orlando and the Agricultural Marketing Service Station at Miami, has led to the conclusion that oil content is not a scientifically valid determinant of maturity of the Florida avocados. The contrary finding of the District Court (No. 6, Appendix I, Ap. p. 38) is unsupported by any evidence in the record of this case. There is no contradiction or impeachment in any respect of the testimony of Dr. Harkness and Dr. Harding, nor any conflicting testimony.

Maturity of the Florida avocados is determined, under the federal regulations, by weight (or size) of the fruit at specified picking dates. For each variety, in each crop season,

permissible picking dates are assigned, based upon the growing conditions in the particular season affecting the crop as a whole, or affecting particular varieties. Three or four successive picking dates are assigned for each variety, about two weeks apart, and at each of these dates the avocados that have attained the specified minimum weight (or size) are permitted to be picked. At each of the successive permitted picking dates the minimum weight requirement is somewhat reduced, until finally the minimum weight requirement is lifted entirely. That this method of determination of maturity of the fruit has proved satisfactory has been confirmed by marketing experience, also by palatability tests of the fruit made in each season since 1954 under the direction of Dr. Harding at the stations of the U. S. Department of Agriculture in Florida. (PX 23, 24, 25, 26.)

The varieties of Florida avocados that mature in the summer months, of West Indian antecedents, practically never attain 8% oil content. Some reach maturity and maximal quality with oil content as low as 2%. The varieties that mature in the autumn months -- the most favorable period for sale of the fruit in California, since production of California avocados is at lowest ebb during these months -- have somewhat higher oil content, but not a single variety attains 8% oil content, in volume sufficient for shipment to California, until a month to two months or more after the commencement of the marketing season for the particular variety. It has never been possible to risk shipment to California of leading varieties of Florida avocados such as the

Waldin, Booth 8, Booth 7, Booth 1, Hickson and Taylor, let alone all of the summer varieties. All of the shipments to California, with possible negligible exception, have been of one variety only, the Lula, and these shipments even though made late in the marketing season for this variety have resulted in substantial losses for failure to pass the 8% oil test. (PX 17 and 21.)* Far more serious than the losses on particular shipments is the fact that no commitments could be made for shipments of the Florida fruit to California upon an assured schedule of deliveries, to synchronize with advertising and promotion programs of large-scale retailers in California.

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* The statement in the opinion of the District Court (Appendix I, Ap. p. 23) that appellants' losses on these shipments "do not appear to be over two or three thousand dollars" is contrary to the evidence. Apparently only the losses sustained by the appellant South Florida Growers Association, Inc., were considered. (PX 17.) On four shipments of Lula avocados made to California by appellant Florida Lime and Avocado Growers, Inc., November 10, 12, 14 and December 8, 1955, the losses aggregated $7,496.01. On a shipment made November 15, 1957, 361 lugs were barred from sale in California for lack of 8% oil content, but in this instance a customer for the fruit was promptly found in Phoenix, Arizona, at no loss to appellant. (PX 21.)

In an attempt to offset the tacit admission that the California 8% oil content requirement absolutely bars sale in that state of certain varieties of Florida avocados of unquestioned quality, appellees sought to show that the marketing of the Florida avocados of West Indian origin in the state of California is not commercially expedient because of time of transportation and short "shelf life." It is also urged that these avocados are of declining commercial importance. In this manner, on scant and insubstantial testimony, appellees assume to judge for the handlers of Florida avocados what shipments of the fruit to California may or may not be commercially advantageous. The assertion that these varieties of Florida avocados are of declining commercial importance is based solely upon a comparison of the volume of these avocados marketed in the 1959-60 season with the volume marketed in the 1955-56 season. (Finding No. 8 - Appendix I, Ap. p. 39.) In the absence of evidence of the weather conditions affecting the production of the specified varieties of avocados in the two selected seasons, such comparison proves nothing. The year-by-year crop records indicate, to the contrary, that these varieties of Florida avocados have not lost ground commercially, although in certain seasons they may have been the principal casualties of frosts and winds that have harassed South Florida.

This diversionary defense ignores the evidence that many pre-tests of different varieties of the Florida-grown avocados were made at the University of Florida Subtropical Experiment Station at Homestead, in the

1954-55, 1955-56, 1956-57 and 1957-58 crop seasons (PX 12 and 13), solely to determine whether shipment of the fruit to California could be hazarded without undue risk of loss for lack of 8% oil content, with the result that shipments of only one variety, the Lula, were ventured.

Substantial nature of questions presented

The national importance of the questions presented by this appeal can hardly be exaggerated. Free access to the California market is denied to the growers and handlers of Florida avocados for the sole reason that these avocados are by nature of lower oil content than the avocados grown in California, with not a word of evidence that the lower oil content of the Florida fruit is indicative of unwholesomeness or inferior quality. The appeal presents a flagrant case of arbitrary restriction of the free flow of commerce among the states, serving only to give commercial advantage to the avocado industry of California over that of Florida. There is vital need for reassertion by this court of its pronouncement that "Our system, fostered by the commerce clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation, that no home embargoes will withhold his export, and no foreign state will by custom duties or regulations exclude them." (H. P. Hood & Sons v. Du Mond, 336 U. S. 525, 539,

69 S. Ct. 657, 665.)*

Also involved in this case is the thwarting by state officers of California of a national program in aid of agriculture deemed essential to the protection of the national economy. There are currently in effect, under the Agricultural Marketing Agreement Act of 1937, 43 marketing programs in twenty states relating particularly to fruits, vegetables and tree nuts, in which more than 130,000 producers are participants and the products have a farm value in excess of $870,000,000. ("Marketing agreements for fruits and vegetables," pamphlet of the Agricultural Marketing Service of the United States Department of Agriculture, May 1958, and mimeographed supplement listing agreements in force October 24, 1961.) In 41 of these marketing agreements and orders, there are provisions authorizing the establishment of quality requirements in terms of grade, size, maturity, or quality.

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* Minnesota v. Barber, 136 U. S. 313; Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 55 S. Ct. 497; Best & Co. v. Maxwell, 311 U. S. 454, 455-457, 61 S. Ct. 334, 335-336; Freeman v. Hewitt, 329 U. S. 249, 252, 67 S. Ct. 274, 276; Dean Milk Co. v. City of Madison, 340 U. S. 349, 353-356, 71 S. Ct. 295, 297-299; Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 529-530, 79 S. Ct. 962, 967-968.

Regulation of the interstate marketing of Florida avocados under valid federal law is spurned by the state officers of California, in favor of regulation of the marketing of this fruit under state law. The District Court finds justification for such action in the recent decision of this court in Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 80 S. Ct. 813. Such misapplication of the decision in the case cited, appellants submit, calls for emphatic repudiation. There is occasion, on this appeal, for reassertion of the basic constitutional principle that "There is no room in our scheme of government for the assertion of state power in hostility to the authorized exercise of federal power." (Simpson v. Shepard, 33 S. Ct. at p. 739.)

Respectfully submitted,

Isaac E. Ferguson,

Attorney for appellants.

APPENDIX I

OPINION OF DISTRICT COURT

In the United States District Court for the Northern District of California, Northern Division.

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation, Plaintiffs, vs. Charles Paul, Director of the Department of Agriculture of the State of California, Edmund G. Brown, Governor of the State of California, and Stanley Mosk, Attorney General of the State of California, Defendants. Civil No. 7648.

Memorandum and Order

Plaintiffs instituted this suit against certain officials[1] of the State of California. Plaintiffs seek an injunction against the enforcement of certain portions of the California Agricultural Code, which plaintiffs contend to be in conflict with the Commerce and Equal

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1. The motion to substitute Charles Paul, Director of Agriculture of the State of California, for defendant Warne, his predecessor in that office, will be granted (Federal Rules of Civil Procedure, Rule 25[d]).

Protection Clauses of the Federal Constitution, and with the Federal Agricultural Marketing Agreement Act of 1937 (Title 7 U. S. C. §601 et seq.) and Florida Avocado Order No. 69 issued under the said Act.

The plaintiffs are Florida growers and packers of avocados, engaged in the interstate marketing of their product. They ship avocados into California, among other states. California has a law (California Agricultural Code, §792) which requires avocados to contain not less than 8% oil by weight, excluding skin and seed, before they can be sold for human consumption. Plaintiffs' object in bringing this suit is to prevent the future application of this law to avocados which they wish to market in California.

This court initially dismissed the action for want of a present, actual case or controversy (Florida Lime & Avocado Growers vs. Jacobsen, 169 F. Supp. 774). The United States Supreme Court reversed this decision, holding that there is an existing dispute amounting to a justiciable controversy which plaintiffs are entitled to have determined on the merits (Florida Lime & Avocado Growers vs. Jacobsen, 362 U. S. 73).

The case has now been heard by a three-judge court, pursuant to the provisions of Title 28 U. S. C. §§ 2281 and 2284. The evidence has been heard, with the rulings on certain objections by defendants having been reserved. Both sides have argued and briefed their positions, and the case is submitted to the court for its

determination.

The court will not, at this time, rule on the objections made by defendants to plaintiffs' evidence on which the court has reserved its ruling. The exhibits and depositions are very voluminous, as are the objections to them. We will assume, arguendo, that the exhibits and depositions offered by plaintiffs are all admissible. Likewise, we do not consider it necessary at this time to hear the evidence which defendants propose to offer in rebuttal to plaintiffs' exhibit 16 for identification. [2]

The Facts

California is the major producer of avocados in the United States. Virtually all of the rest of the avocados produced in the United States are raised in Florida. California grows principally avocados of Mexican origin, of which there are a number of differing individual varieties. Florida grows principally avocados of various "hybrid" varieties. About 12% of Florida's production consists of West Indian varieties. These are declining in importance, owing to poor shipping qualities, short shelf life and the susceptibility of the trees to freezing.

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2. It is recognized that the right had been reserved to defendants to introduce such evidence at a further hearing, if necessary (See pp. 190-191 of the trial transcript). We are of the view that such evidence is not necessary.

In 1925, practically all of the avocados produced in the United States came from California.[3] In that year, California adopted the requirement that all avocados marketed in this state contain at least 8% oil by weight, excluding the skin and seed. There was then, and still is, a body of respectable scientific opinion to the effect that the oil content of avocados in the hard state is the best indicator of maturity.

Avocados are customarily picked and marketed in a hard state. After purchase by the consumer, they are allowed to soften and ripen. If the avocados are picked while immature, they shrivel up and become useless when they soften. They become rubbery and unpalatable, with an unpleasant aftertaste. If they are picked when mature, they ripen while softening, and become palatable and desirable (to those who like them).

It is not simple or easy to tell whether an avocado which has just been picked, in a hard state, is, or is not, mature. A person of great experience can make a well educated guess as to whether or not such an avocado is mature, but the only sure test is to let it ripen and eat it.

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3. Florida's current high production of avocados results from heavy plantings which began in or about 1940. The trees then planted did not bear fruit until eight or ten years after being planted.

There is a temptation on the part of growers to rush immature avocados to the market at the start of the season, when mature avocados are scarce and the price is high. The ordinary retailer and consumer do not realize that the avocados are immature until after they have purchased the fruit and allowed it to soften. The marketing of such avocados cheats the consumer, and it has a bad effect upon retailers and producers as a whole, since it increases future sales resistance.

To prevent the marketing of immature avocados, it is desirable to establish standards by which one can tell which avocados are immature, at the time that they are picked. There is expert opinion to the effect that the best standard to be used for such purpose is the percentage of oil in the fruit. Other expert opinion rejects this yardstick. It seems to be conceded by all that there is no better physical test than oil content by which to judge the maturity of the hard fruit by itself (other than to use the time-consuming method of letting it ripen and tasting it). Size and appearance are possible tests, but are not reliable. There is a body of expert opinion which holds that the best test of maturity is to establish picking dates for the fruit. The test used for purposes of the Florida Avocado Order is based upon picking dates.

The picking date method works as follows: For each variety of avocado in a particular production area, A, B and C dates are promulgated on the basis of past experience. No avocados of a particular variety may be picked

until the A date for that variety. On and after the A date, fruit of a certain size and weight may be picked and shipped. On and after the B date, fruit of a smaller size and weight may be picked and shipped. On and after the C date, all restrictions of size and weight are removed.

The fruit growing on different trees of the same varieties matures at different times, depending on the age of the trees, the weather, soil conditions, etc. The fruit upon a particular tree does not all mature at the same time. Differences of size and weight are of assistance in picking the mature from the immature fruit which has all been picked from the same tree, but they are not infallible guides. The picking date method, then, inevitably must let some immature fruit go to market, or keep some mature fruit off the market, or both.

Mexican varieties of avocados contain (generally speaking) the highest oil content of any varieties, when mature. Hybrid varieties attain the next highest oil percentages, and West Indian the lowest. Hybrid varieties generally attain oil content in excess of 8% if left on the trees long enough, but they do not necessarily attain such an oil content by the time that they may be marketed under the Florida Avocado Order. They are mature enough to be acceptable prior to the time that they reach that content, according to plaintiffs' witnesses. West Indian varieties do not attain an 8% oil content until they are past their prime.

California is the State of greatest consumption of avocados. In 1955-1956, California produced about two-thirds of the avocados consumed in the United States, and consumed over two-thirds of its own production, in addition to being a prime market for Florida avocados.

Plaintiffs have made fairly sizeable shipments of avocados to California in the past. Over 95% of them have passed the 8% oil content test. The other shipments have mostly been reshipped to other western states, although it is permissible under the California system to recondition shipments by removing the most immature avocados in the hope of passing the test. The difficulty here appears to be the lack of external indicia of maturity or oil content. Plaintiffs' monetary losses as a result of the rejected shipments are not clearly established, but at most do not appear to be over two or three thousand dollars. Plaintiffs' shipments furnish proof that the California test does not per se bar Florida avocados from the California market.

Plaintiffs offered testimony to the effect that there are wide variations in oil content among avocados picked from the same tree, but that tasters could not pick out the high oil avocados by taste. [4] Defendants offered

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4. It was not explained how plaintiffs' witnesses surmounted the inherent difficulties of such a test. The oil test is ordinarily made when the fruit is hard. It ordinarily involves the destruction of the fruit. Even (Continued)

testimony to the effect that the oil test was a good test of maturity, and was the best test available. In our opinion, the testimony on behalf of the defendants, under all of the circumstances, is more convincing and entitled to greater weight.

Dr. Harding (plaintiffs' witness) stated that an oil content test might make a satisfactory test of maturity, if the percentage required were set independently for different varieties. No physical test (or picking date test) is perfect, but this court is convinced that the most satisfactory physical test for the maturity of avocados is some sort of oil content test.

Equitable Jurisdiction

A court of equity has a certain discretion as to whether it should exercise its equitable jurisdiction in any particular case. Defendants argue that plaintiffs have made no showing of threatened irreparable damage to them, such as would justify the issuance of an injunction suspending the enforcement of the laws of the

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4. (Continued) if only half of an individual avocado were tested, the other half would not ripen normally. If the oil test were made on soft fruit, it would not conform to the California test, and there would be a danger of a biased sampling of fruit (that is, the test might be made only on fruit which had given physical indications during softening that it was mature).

State of California.[5] If the instant case were before this court for the first time, the court would decline to take equitable jurisdiction, on the showing made by plaintiffs (See: Watson vs Buck, 313 U. S. 387; A. F. of L. vs. Watson, 327 U. S. 582).

If the court were required to take equitable jurisdiction of the instant case, coming before this court for the first time, it might well be advisable for the court to retain jurisdiction of the case, pending an authoritative interpretation of the California law by the California courts, which might be expected to result from the declaratory judgment proceeding which defendants have now brought against plaintiffs in the Superior Court of the State of California, in and for the County of Sacramento[6] (See: A. F. of L. vs. Watson, supra).

This case is now before this court, however, with a mandate from the United States Supreme Court, directing this court to conduct further proceedings consistent with the opinion of the Supreme Court. In that opinion, it is stated that plaintiffs herein are entitled to have this controversy decided upon the merits. This

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5. For some discussion of the delicacy of the exercise of such equitable power, see the material in footnote 5 of Florida Lime & Avocado Growers vs. Jacobsen, supra, at 362 U. S. 77.

6. Case No. 125826, in the records of that court.

court concludes, therefore, that in the instant case this court has no discretion to decline equitable jurisdiction or to retain jurisdiction while awaiting state court decision.

The Merits of the Controversy

In the remainder of this opinion, we will consider, first, the constitutional validity of the California law (A) in relation to the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, and (B) in relation to the Commerce Clause of the Federal Constitution. Then we will consider the question of whether the California law is in conflict with federal laws or regulations.

In considering these questions, one must bear in mind that the burden of proof is upon plaintiffs herein to establish all the elements of their case by a preponderance of the evidence (31 C. J. S. pp. 713-714; O'Brien vs. Equitable Society, 212 F. 2d 383; and See: United States vs. Denver & R. G. Ry. Co., 191 U. S. 84; Northern P. Ry. Co. vs. Lewis, 162 U. S. 366; and Morse vs. Fields, 127 F. Supp. 63).

Moreover, in discussing Due Process limitations on the legislative power of the State of California, it must be noted that it is not enough for plaintiffs simply to establish that the legislation in question is out of harmony with a particular school of thought (Williamson vs. Lee Optical Co., 348 U. S. 483). They must go beyond that. If it should be found that there is a respectable body of opinion in the

light of which the enactment is reasonable, then it is for the legislature, not this court, to hold the balance between two conflicting schools of thought, and to decide which of them preponderates.

Constitutionality of the California Law

A. Equal Protection

Plaintiffs contend that the California 8% oil content test is arbitrary and unreasonable, and in violation of the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution.

The Equal Protection Clause does not require perfection in legislative classification (See: Phillips Chemical Co. vs. Dumas School District, 361 U. S. 376). It is not enough that a classification by state law is discriminatory; it must be arbitrary and unreasonable before the Equal Protection Clause may be invoked to strike it down (Allied Stores of Ohio vs. Bowers, 358 U. S. 522 and Borden's Co. vs. Ten Eyck, 297 U. S. 251). It is for the legislature, not the courts, to write the laws. The people, if the legislature commits abuses, have their remedy at the polls (Williamson vs. Lee Optical Co., supra).

It must be conceded that the 8% oil content requirement has worked effectively to bar immature avocados from the California markets. It is clearly established that an oil content test is the best available physical test for maturity.

The only real issue is whether California must establish different percentages of required oil content for different kinds of avocados. There are hundreds of varieties of avocados. If each is to have its own required oil content, it is almost inevitable that the regulation must in time come under the control of the producers. The California legislature cannot be expected to establish, after considered deliberation, hundreds of standards. If two or three categories are established, it will not always be an easy matter to decide in which category a particular variety may belong. These difficulties offer reasonable support for the decision of the State of California to enact a single uniform standard. This is perfectly proper for "not only the final purpose of the law must be considered, but the means of its administration" (St. John vs. New York, 201 U. S. 633).

The police powers of California might reasonably be applied to insure a minimum oil content of the avocados for the sake of the higher nutritional value of the avocado, even if there were no issue of the maturity of the fruit. Legislation imposing a minimum butterfat content requirement on milk sold for human consumption has been customary in this country for many years (See: St. John vs. New York, supra). Such legislation disregards the fact that different breeds of cattle naturally produce different amounts of butterfat in their milk. It imposes a uniform requirement on all milk sold for human consumption, whether from Jersey or Holstein cows. There is no good reason why a similar requirement cannot be imposed on all avocados sold for human consumption. The

general consuming public has traditionally given best acceptance to the richer kinds of milk. A requirement of similar richness for avocados would appear to be reasonable. [7]

Granting the possibility of a better law than the one devised by the California legislative authorities, that does not require a finding that the law which has been passed is unconstitutional. The test is whether it is unreasonable and arbitrary. We hold that it is not.

B. Interstate Commerce

It is patent that the California law is designed to prevent the marketing of immature avocados for human consumption in California. Such an enactment is not automatically invalidated because some of the avocados in question move into the state in interstate commerce (See: Milk Board vs. Eisenberg Co., 306 U. S. 346; Simpson vs. Shepard, 230 U. S. 352). It

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7. The State of California, which imposes the 8% oil content requirement, seems to have extremely good consumer acceptance of avocados. In 1955-1956, with less than a tenth of the nation's population, the people of California consumed approximately half of the avocados consumed in the United States. This may be due to other factors than the fact that California consumers can rely on getting 8% oil. But it may be largely due to that fact.

is competent for a state to adopt protective measures for the health, safety, morals and welfare of its people, although interstate commerce may incidentally be involved (Simpson vs. Shepard, supra; Mintz vs. Baldwin, 289 U. S. 346). State legislation, based on police power, which does not discriminate against interstate commerce is not in conflict with the Commerce Clause (Huron Cement Co. vs. Detroit, 362 U. S. 440).

The question of whether the California law discriminates against interstate commerce is more difficult. It is clearly established that the law complained of was passed for a valid police purpose, without thought at the time of its passage of discriminating against Florida avocados. Florida avocados were of no commercial importance at the time that California adopted the 8% oil content requirement. It is admitted that there is no discrimination in the enforcement of the law. The only question is whether the 8% oil content requirement is inherently discriminatory against interstate commerce in the circumstances which now exist.

Some of the varieties of avocados grown in Florida cannot with commercial practicability meet the 8% requirement. These are the West Indian varieties. The bulk of West Indian avocados grown in Florida are Waldins, which do attain 8% oil content, but are practically unmarketable at that time. The West Indian avocados, however, are difficult to market in distant states at any stage in their development, due to poor shipping qualities and short shelf

life. Interference with the marketing of West Indian avocados in California is, for all practical purposes, within the maxim of de minimis non curat lex.

The West Indian varieties, actually, are discriminated against because of their qualities, not because they are shipped in interstate commerce. Avocados of the West Indian varieties are not as rich as the fruit of the varieties which do meet the 8% requirement. The application of the 8% requirement in California, ever since 1925, has naturally prevented the commercial development in this state of any varieties which cannot meet the requirement. As proof that there is no discrimination against interstate commerce as such, we see that the overwhelming majority of the shipments of avocados made by plaintiffs to this state have been marketed successfully after passing the California test.

Looking at the testimony of plaintiffs' witness, Dr. Harding, we see that the hybrid avocados may be "acceptable," but not necessarily in "prime condition," before they reach the 8% oil requirement. Plaintiffs want to market them before they reach prime condition, in order to get the high prices which prevail at the start of the season. This is the very sort of practice which the California law was enacted to prevent. California producers may no longer jump the gun in this fashion. It is not discriminatory treatment, but equality of treatment, of which plaintiffs seem to complain.

We hold, then, that the California 8% oil

requirement is not unconstitutional.

Alleged Conflict Between State and Federal Law

The remaining question for the court is whether the California 8% oil requirement must give way in the face of Florida Avocado Order No. 69, which was issued under the authority of the Federal Agricultural Marketing Agreement Act of 1937.

The federal law attempts to prevent the marketing of immature avocados by Florida producers by an application of the picking date method of determining maturity. The federal law says that Florida producers may not market their avocados unless they are picked and shipped in accordance with the shipping dates promulgated. It does not say that they may market their avocados without further inspection by the states, if they comply with the shipping dates established by the federal order. When the Congress of the United States means to exert its constitutional supremacy thus, it is able to say so in clear and explicit terms (See: Title 21 U. S. C. § 121).

The federal law does not cover the whole field of interstate shipment of avocados. It would be lawful to raise avocados in Texas or Louisiana and ship them into California without complying with Florida Avocado Order No. 69,

or any similar Federal order.[8] California avocados may be shipped to any state of the United States without complying with Florida Avocado Order No. 69, or any similar order.

California consumers are not given complete protection from the marketing of immature avocados by any federal law or order. For all that the federal law declares, avocados grown in any state but Florida may be sold in California without any standards designed to insure maturity. It is clear that insofar as California forbids the marketing of avocados with less than 8% oil content grown anywhere but in Florida, the California law is not in conflict with federal law or regulations. Nor does it directly conflict with the explicit terms of such law or regulations, even when applied to Florida-grown avocados.

California has lawfully applied an 8% oil content test to avocados marketed by her own producers, which may be applied to any state not covered by the federal order. If the implication of federal pre-emption of the field is read into Florida Avocado Order No. 69 and the Act under which it was issued, Florida producers alone will be privileged to avoid compliance with that test. Such an implication should not lightly be made (Cloverleaf Co. vs. Patterson, 315 U. S. 148). Congress, not having covered the whole field of interstate transportation of avocados, has left a wide

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8. At present, no state of the United States, excepting Florida and California, raises avocados in significant quantity.

field for the protection of consumers by the states by the appropriate exercise of the state police power (See: Reid vs. Colorado, 187 U. S. 137). The case would be different if the federal government had established a complete and uniform regulatory scheme which covered the whole problem (See: Oreg.-Washington Co. vs. Washington, 270 U. S. 87), but this the Congress has not done.

Plaintiffs derive some comfort from the case of Mintz vs. Baldwin, supra. In that case, the granting of a federal certificate would have prevented the application of state inspection requirements, only because the federal law there interpreted expressly so stated.

In Cloverleaf Co. vs. Patterson, supra, it was declared that where a federal statute does not in specific terms prohibit state action, it must be clear that the federal provisions are inconsistent with those of the state, before prohibition of state action may be inferred. It was further held that the federal government had established its own exclusive regulation of the manufacture of the product there involved, to the exclusion of state regulation of such manufacture. However, it was stated that if the finished product were offered for sale in a state, it would be subject to the pure food laws of that state. To infer that the California 8% oil content requirement is not applicable to Florida avocados because of Florida Avocado Order No. 69, this court would be required to overrule Cloverleaf Co. vs. Patterson, supra. This, the court has neither the power nor the inclination to do.

Both the state and the federal requirements may be, and are being, enforced, without any clash between the two authorities. We are enjoined by the highest authority against seeking out conflict between state and federal regulation, unless such conflict clearly exists (Huron Cement Co. vs. Detroit, supra).

We conclude that plaintiffs cannot prevail in this case, upon the merits thereof. The California law which plaintiffs have called in question is not in conflict with any provision of the United States Constitution, or with any federal law or regulation.

IT IS, THEREFORE, ORDERED that plaintiffs take nothing by this action, and that judgment herein be, and it is, rendered against plaintiffs and in favor of the defendants.

AND IT IS FURTHER ORDERED that defendants prepare findings of fact and conclusions of law, a form of judgment, and all other documents necessary for the full and complete disposition of this case in accordance with this Memorandum and order, and lodge them with the

clerk of this court pursuant to the applicable rules and statutes.

DATED: July 12, 1961

HOMER T. BONE
Senior Judge, United States Court of Appeals for the Ninth Circuit.

LOUIS E. GOODMAN
Chief Judge, United States District Court for the Northern District of California.

SHERRILL HALBERT
United States District Judge

§ § §

In the United States District Court for the Northern District of California, Northern Division.

Florida Lime and Avocado Growers, Inc., a Florida corporation, and South Florida Growers Association, Inc., a Florida corporation, Plaintiffs, vs. Charles Paul, Director of the Department of Agriculture of the State of California; Edmund G. Brown, Governor of the State of California; and Stanley Mosk, Attorney General of the State of California, Defendants. Civil No. 7648.

Findings of Fact and Conclusions of Law

The above entitled action came on regularly for trial on February 7 and 8, 1961, before the court, sitting without a jury, a jury having been waived, Isaac E. Ferguson appearing for plaintiffs, and John Fourt, Deputy Attorney General, State of California, appearing for defendants, and evidence both oral and documentary having been introduced and the cause submitted for decision, makes the following findings of fact and conclusions of law in accordance with its memorandum opinion filed July 12, 1961.

Findings of Fact

1. Plaintiff Florida Lime and Avocado Growers, Inc., is a corporation which was duly incorporated by the State of Florida on April 6, 1956; plaintiff South Florida Growers Association, Inc., is a corporation which was duly incorporated by the State of Florida on April 29, 1953.

2. The defendant Charles Paul is Director of Agriculture, State of California, having held such office since February 1, 1961; the defendant Stanley Mosk is Attorney General, State of California, having held such office since January 5, 1959; the defendant Edmund G. Brown is Governor, State of California, having held such office since January 5, 1959.

3. Avocados of all varieties grown in the United States are picked for shipping and commercial marketing in a hard inedible state; if picked when immature, the fruit will shrivel, will become rubbery in texture, and will be bitter in taste and useless as food; if picked when mature, the fruit will soften into palatable, edible fruit; consumers and retail grocers cannot easily determine whether a hard avocado is mature so that it will soften into a palatable, edible fruit.

4. There is a temptation for growers to pick avocados in an immature state in the early portion of the avocado growing season when avocados are in short supply and the market price is high.

5. Other than water, oil is the chief constituent of avocados and the percentage of oil increases from the time of the beginning growth of the fruit on the tree to a maximum during the maturity of the fruit, and is the best available index of maturity of the fruit.

6. In order to assure consumer satisfaction and demand, it is desirable to establish minimum standards by which it can be determined whether an avocado is mature at the time of picking. A standard requiring a minimum of 8% of oil in an avocado before it may be marketed is scientifically valid as applied to hybrid and Guatemalan varieties of avocados grown in Florida and marketed in California.

7. Avocados grown in Florida can be grouped into three classifications:

(a) Those varieties which trace their origin to parent trees in the West Indies;

(b) Those varieties which are hybrids developed from varieties originating in the West Indies and varieties originating in Guatemala; and

(c) Those varieties which trace their origin to parent trees in Guatemala.

8. The West Indian varieties grown in Florida are of declining commercial importance, and the volume of Florida commercial shipments of the West Indian varieties have dropped from approximately 20% of total Florida commercial shipments in the 1955-56 shipping season to approximately 12% in the 1959-60 shipping season.

9. Hybrid and Guatemalan varieties in the 1959-60 shipping season constitute approximately 88% of total Florida commercial shipments, and are of increasing commercial importance as new Florida plantings of these varieties come into production.

10. The West Indian varieties have such poor shipping qualities and short retail store shelf-life that it is not commercially feasible to transport such varieties across

the continent to California, even in the absence of the California 8% oil content statute.

11. The California 8% oil content requirement is effective in keeping off the market immature avocados of the varieties grown in California and of the hybrid and Guatemalan varieties grown in Florida; the varieties of avocados grown in California and the hybrid and Guatemalan varieties grown in Florida attain or exceed 8% oil content while in a prime commercial marketing condition which assures that said avocados will soften into palatable, edible fruit.

12. Neither the plaintiff Florida Lime and Avocado Growers, Inc., nor the plaintiff South Florida Growers Association, Inc., marketed or attempted to market, avocados in California during either the fiscal year ending March 31, 1959, or ending March 31, 1960; no proof was made that either plaintiff marketed, or attempted to market, any avocados in California from March 31, 1960, to the date of trial.

13. Plaintiffs have neither suffered nor been threatened with irreparable injury.

Conclusions of Law

1. This action seeks to enjoin the enforcement of a state law upon the ground of unconstitutionality and plaintiffs' application

for such an injunction was properly heard before this three judge court under 28 U. S. C. 2281.

2. The court has jurisdiction of the subject matter of this suit and of the parties.

3. Plaintiffs' evidence fails to establish a case within the equity jurisdiction of this court.

4. Section 792, California Agricultural Code, is consistent with the federal Agricultural Marketing Agreement Act of 1937, and with the marketing regulations for avocados grown in South Florida issued by the Secretary of Agriculture thereunder.

5. Section 792, California Agricultural Code, is consistent with the commerce clause of the United States Constitution, Article I, Section 8, Clause 3, and with the equal protection clause of Section 1 of the Fourteenth Amendment thereto.

6. That the enforcement of Section 792, California Agricultural Code, and the regulations promulgated pursuant thereto against plaintiffs, are constitutional and valid.

7. Defendants are entitled to judgment that plaintiffs take nothing; that plaintiffs' request for injunction be denied; that the action be dismissed on the merits; and that the defendants recover of the Florida Lime and

Avocado Growers, Inc., and South Florida Growers Association, Inc., their costs of action.

Judgment is hereby ordered to be entered accordingly.

Dated: September 21, 1961.

HOMER T. BONE
United States Circuit Judge

SHERRILL HALBERT
United States District Judge

APPENDIX II

AGRICULTURAL CODE OF CALIFORNIA, DIVISION V, STANDARDIZATION*

Section 784. Preparation, etc., of nonconforming fruits, nuts or vegetables. It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter.

Section 785. Abatement of noncomplying fruits, nuts and vegetables.

(Public nuisance: Holding.) Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to

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*Deering's Agricultural Code of the State of California, 1950, with supplement covering legislation through 1959 session.

condemn and abate such nuisance, as herein provided.

(Warning tag: Detachment, alteration, etc., unlawful.) The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

(Notice: Contents.) The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

(Duty to notify owners.) If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an

interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

(Abatement with consent.) The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

(Petition for abatement.) If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

(Non-perishable lot: Report: Petition: Answer: Determination.) If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of a report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom. Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

(Judgment: Sale: Costs deducted.) The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner. (Amended by Stats. 1953, ch. 606, § 2, ch. 752, § 1; Stats. 1955, ch. 431, § 1.)

Section 785.6. Civil liability of violator: Added penalty: Amount: Value of noncomplying fruits, etc., defined: Disposition of money recovered. Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value of lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture fund.

Section 790. Fruit, nut and vegetable standards: Establishment. There are hereby established standards for fruits, nuts and vegetables which shall include apricots, avocados, berries, cherries, citrus fruits, dates, grapes, nectarines, peaches, pears, oriental persimmons, plums, and fresh prunes, "wonderful" pomegranates, quinces, walnuts, artichokes, asparagus, Brussels sprouts, cantaloupes, carrots, cauliflower, celery, green corn, head lettuce, Italian sprouting broccoli, melons, onions, peas, potatoes, sweet potatoes, tomatoes and apples.

Section 792. Avocados.

(Freedom from defects: Tolerance.) Avocados shall be free from all defects,

including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more, by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

(Definition.) "Defect" includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

(Oil content.) All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed.

Section 831. Violation of chapter: Misdemeanor: Punishment. The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment in the county jail for not more than six months, or by both.

APPENDIX III

AGRICULTURAL MARKETING AGREEMENT ACT OF 1937*

7 U. S. C. A. Sec. 601. Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce. May 12, 1933, c. 25, Title I, §1, 48 Stat. 31; June 3, 1937, c. 296, §§1, 2(a), 50 Stat. 246.

7 U. S. C. A. Sec. 602. Declaration of policy; establishment of base periods for prices; marketing standards

It is declared to be the policy of Congress—

*The Agricultural Marketing Agreement of June 3, 1937 (7 U. S. C. A. sections 671-674) affirmed the validity of specified sections of the Agricultural Adjustment Act of May 12, 1933. (Historical note, 7 U. S. C. A. page 337.)

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301 (a) (1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such minimum st ndards of quality and maturity and such gr ling and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk

and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest. May 12, 1933, c. 25, Title I, §2, 48 Stat. 32; Aug. 24, 1935, c. 641, §§ 1, 62, 49 Stat. 750, 782; June 3, 1937, c. 296, §§ 1, 2(b), 50 Stat. 246, 247; Aug. 1, 1947, c. 425, §1, 61 Stat. 707; July 3, 1948, c. 827, Title III, §302(a), 62 Stat. 1257.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-604, 607, 608a, 608b, 608c, 608d, 608e-1, 608f, 612, 613, 614-19, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices. As amended Aug. 28, 1954, c. 1041, Title IV, §401(a), 68 Stat. 906.

7 U. S. C. A. Sec. 608. Powers of Secretary—Investigations; proclamation of findings

(1) Whenever the Secretary of Agriculture has reason to believe that:

(a) The current average farm price for any basic agricultural commodity is less than the fair exchange value thereof, or the average farm price of such commodity is likely to be less than the fair exchange value thereof for

the period in which the production of such commodity during the current or next succeeding marketing year is normally marketed, and

(b) The conditions of and factors relating to the production, marketing, and consumption of such commodity are such that the exercise of any one or more of the powers conferred upon the Secretary under subsections (2) and (3) of this section would tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title, he shall cause an immediate investigation to be made to determine such facts. If, upon the basis of such investigation, the Secretary finds the existence of such fact, he shall proclaim such determination and shall exercise such one or more of the powers conferred upon him under subsections (2) and (3) of this section as he finds, upon the basis of an investigation, administratively practicable and best calculated to effectuate the declared policy of said sections.

* * * * * * *

7 U. S. C. A. Sec. 608b. Marketing agreements; exemption from antitrust laws

In order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling

of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of said sections. May 12, 1933, c. 25, Title I, §8(2), 48 Stat. 34; Apr. 7, 1934, c. 103, §7, 48 Stat. 528; renumbered §8b and amended Aug. 24, 1935, c. 641, §4, 49 Stat. 753; June 3, 1937, c. 296, §1, 50 Stat. 246; June 30, 1947, c. 166, Title II, §206(d), 61 Stat. 208.

7 U. S. C. A. 608c. Order regulating handling of commodity—issuance by Secretary

(1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623 and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens,

obstructs, or affects, interstate or foreign commerce or product thereof.

Commodities to which applicable

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except canned or frozen grapefruit, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits, other than olives and grapefruit, for canning or freezing), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), soybeans, hops, honeybees and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), * * *

Notice and hearing

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

Finding and issuance of order

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-19, 620, 623, and 624 of this title with respect to such commodity.

Milk and its products; terms and conditions of orders

(5) This part of section 608c relates to orders governing milk and its products.

Other commodities; terms and conditions of orders

(6) In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any

specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

* * * * * * *

(F) Requiring or providing for the requirement of inspection of any such commodity produced during specified periods and marketed by handlers;

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(H) Providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: Provided, however, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 and the Standard Containers Act of 1928;

(I) Establishing or providing for the establishment of marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order.

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Further provisions of section 608c govern the procedure for adoption of marketing agreements, also the administration and enforcement of orders made by the Secretary of Agriculture in carrying out such agreements.